

**IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT**

STATE OF OHIO)	CASE NO. CR-2017-07-2512
)	
Plaintiff)	JUDGE MARY MARGARET
-vs-)	ROWLANDS
)	
ANTONIO WILLIAMSON)	
)	<u>ORDER</u>
Defendant)	

- - -

This matter is before the Court on Defendant’s motion to dismiss counts 6-15 of the indictment on the grounds he was selectively prosecuted based on race, filed on August 3, 2018¹. On July 24, 2020, the Court found Defendant demonstrated a *prima facie* case for selective prosecution warranting an evidentiary hearing, which proceeded on August 3, 2020, by video due to the public health threat caused by COVID-19. Updated Emergency Misc. Order 2020-0700, filed July 29, 2020, and *7/31/2020 Administrative Actions In re Use of Technology*

¹ The motion was filed while this case was before another Court until transferred to this Court on June 20, 2019. Counts 6-15 were bifurcated from the other charges in the indictment, which were tried first.

and Remote Administrations of Oaths and Affirmations (OH Sup. Ct.), 2020-Ohio-3861.

Defendant waived his right to appear in person pursuant to Crim. R. 43(A).

Defendant asserts he was singled out by the Summit County Sheriff's Office (SCSO) for prosecution for allegedly violating R.C. 2913.04(D), while white male SCSO deputies who engaged in similar conduct were not referred by the SCSO for prosecution². The State asserts the non-referrals for prosecution for GP, AB, WW, and CP were due to different circumstances and not race based.

R.C. 2913.04(D) states:

No person shall knowingly gain access to, attempt to gain access to, cause access to be granted to, or disseminate information gained from access to the Ohio law enforcement gateway established and operated pursuant to division (C)(1) of section 109.57 of the Revised Code without the consent of, or beyond the scope of the express or implied consent of, the superintendent of the bureau of criminal identification and investigation.

On March 19, 2017, Defendant was alleged to have committed a sexual assault. During the course of investigating the alleged sexual assault, the Akron Police Department (APD) believed Defendant may have used the Ohio Law Enforcement Gateway (OHLEG) to obtain information about the accuser or other possible victims. For convenience, APD requested the SCSO process a request for an audit of Defendant's OHLEG account. SCSO Detective Jason Kline (Detective Kline) submitted the request to the Ohio Attorney General's Office (OAG) with a date range of January 2014 through March 2017. When the audit was returned, the OAG's office reported Defendant's OHLEG account did not reveal Defendant searched the accuser, however, Defendant conducted many self-searches which the OAG wanted investigated, either by the OAG or by the SCSO. In an effort to stay in the good graces of the OAG, which grants the SCSO's OHLEG privileges, SCSO agreed to undertake the

² Defendant did not allege the Summit County Prosecutor's Office's engaged in selective prosecution, only that the Summit County Sheriff selectively referred Defendant for prosecution due to his race.

investigation. After review, the OAG directed the SCSO to present its findings to the Summit County Prosecutor's Office. The SCSO asserts it had no discretion whether Defendant's OHLEG use would be referred to the Summit County Prosecutor to decide if Defendant's OHLEG use would be criminally prosecuted.

During Detective Kline's investigation of Defendant's OHLEG use, he was advised by Defendant's prior counsel that Defendant would not be making any statements to law enforcement. Detective Kline testified that without Defendant's input, he was on his own to determine if there was a legitimate law enforcement purpose for Defendant's self-searches. Detective Kline testified he was unable to fathom any possible law enforcement reasons for certain self-searches, although Detective Kline acknowledged they could exist. He reported his results to the OAG and then to the Summit County Prosecutor's Office to decide if criminal charges would be sought against Defendant. Defendant was supplementally indicted on January 2, 2018, with ten counts of OHLEG violations, occurring from January 2014 through March 2017. The testimony presented at the hearing denied the SCSO selectively prosecuted Defendant based on his race as an African American. The SCSO asserted it had no discretion in the decision to criminally investigate or prosecute Defendant for OHLEG violations.

The testimony at the evidentiary hearing focused on the Ohio Law Enforcement Gateway³ (OHLEG) use of GP, WW, CP, and AB, all SCSO employees and white males who were alleged to have misused OHLEG prior to Defendant's indictment, but were never referred for prosecution.

1. GP used OHLEG to search and obtain information about subjects of his prurient interests in January 2013. SCSO determined GP violated several rules and

³ OHLEG and LEADS provide the same information although OHLEG is accessed by the account holder over the internet, whereby LEADS is requested over the radio. Witnesses used the terms interchangeably. For purposes of this Order, LEADS and OHLEG will be used interchangeably.

regulations of the SCSO and his OHLEG use was not for a law enforcement purpose. However, GP resigned before the administrative investigation and process concluded. The SCSO did not commence a criminal investigation or refer the matter to the Summit County Prosecutor's Office for a decision on prosecution.

2. AB became suspicious of a vehicle that was following him after he ended his shift. AB called the SCSO and requested a run of the license plate of the suspicious car to identify the owner. When the dispatcher questioned if this was a proper use of OHLEG since AB was off duty, AB directed profanity at the dispatcher. The dispatcher made a complaint to a superior and the SCSO investigated the matter. The SCSO determined a legitimate law enforcement purpose existed for AB's request and AB did not misuse OHLEG due to the anti-police sentiment at the time (September 2016) where police officers were targeted and shot in their cruisers nationwide⁴. AB was administratively reprimanded for being rude to the dispatcher, and his OHLEG use was not referred to the Summit County Prosecutor's Office for a decision on prosecution.
3. On February 23, 2017, WW was off duty and called the SCSO to run a warrant check on a person at one of his rental properties. The SCSO internally investigated the matter and referred it to the disciplinary committee, who recommended WW's termination for violating OHLEG use rules. Summit County Sheriff Steve Barry (Sheriff Barry) overturned the disciplinary committee's recommendation. The testimony differed regarding whether running a warrant check on an individual is a law enforcement purpose when the requestor is off duty. The SCSO did not

⁴ It is unclear how the identity of a vehicle's owner would dispel or confirm AB's fear of becoming a victim of police officer assassination, and therefore, within the OAG's scope of implied or express consent to access LEADS. Nevertheless, SCSO determined AB's request to access LEADS was for a law enforcement purpose and took no further action.

criminally investigate WW's OHLEG use, or refer the matter to the Summit County Prosecutor's Office for a decision on prosecution.

4. CP performed a self-search on July 19, 2017, at the request of his supervisor, for CP's annual review to determine if CP's driver's license was valid as required for employment with the SCSO⁵. The OAG found this to have been for a law enforcement purpose, but it was a "bad practice" by the SCSO and a violation of the OAG's rules and regulations. The OAG admonished the SCSO not to use OHLEG in this manner again, and that the SCSO's practice of having persons conduct self-searches on OHLEG as part of an annual review must change⁶. Further, CP was unable to provide law enforcement purposes for why he ran searches of certain deputies several times in one year. CP was not referred to the Summit County Prosecutor's Office for a decision on prosecution.

The evidence revealed the investigations into the conduct of CP, WW, AB, and GP commenced as internal SCSO complaints and investigations. The State asserts the manner in which the investigations into CP, WW, AB, and GP commenced gave the SCSO discretion not to refer the matters for prosecution because their internal process did not find these SCSO employees lacked legitimate law enforcement purposes; as opposed to Defendant's situation where an outside agency, the OAG, was involved, thereby removing the SCSO's discretion. Generally, a non-SCSO detective communicates with the Summit County Prosecutor's Office to determine how the Prosecutor wants to proceed. SCSO internal investigations are presented to the Sheriff first. In the case of WW, the Sheriff's Fiduciary Attorney and Legal Advisor, Michael Cody, believed WW's use of LEADS was wrongful and criminal, and he advised

⁵ This use was characterized as "laziness" on the part of the supervisor, who should have run the OHLEG search of CP himself or directed someone other than CP to do so.

⁶ In 2018, due to "bad practices," the OAG de-certified the entire SCSO from using OHLEG until each SCSO employee was retrained and re-certified.

Sheriff Barry of his legal opinion. The internal administrative investigation committee recommended WW for termination; however, Sheriff Barry⁷ overruled the recommendation of the internal administrative investigation committee, and WW remained employed at the SCSO. Sheriff Barry even reduced the sanctions recommended by the committee. Sheriff Barry also rejected the idea that WW's use of LEADS was criminal in nature, and WW was never referred for prosecution. Despite his legal opinion that WW's LEADS use was criminal in nature, Attorney Cody did not refer WW's use of OHLEG to the Summit County Prosecutor for a determination for prosecution, because doing so would have made him insubordinate to his employer, the Summit County Sheriff. Attorney Cody testified the criminal nature of WW's conduct remains a source of disagreement between Sheriff Barry and himself.

In 2018, the OAG became aware of SCSO's many "bad practices" regarding their OHLEG use, and told the SCSO it "was clear that within the Summit County Sheriff's Office, we did not understand that running oneself through OHLEG was a violation of their rules and regulations. They decertified every sworn deputy in the Summit County Sheriff's Office and made every sworn deputy go through recertification in 2018 as a consequence." Per Attorney Cody, Defendant's OHLEG use occurred during the period the SCSO's bad practice of running oneself was widespread, and unknown to the SCSO as violating OAG rules and regulations. Defendant's alleged misuses occurred before 2018. In 2017, Defendant's alleged misuse occurred within months of WW's questionable use and CP's self-search. There is no disagreement that GP's OHLEG use in 2013 lacked any law enforcement purpose, yet, inexplicably, his use was never referred for prosecution. Evidence revealed GP's resignation from the SCSO would not have prevented a referral for prosecution. SCSO witnesses agreed

⁷ Sheriff Steve Barry is no longer the current Summit County Sheriff. However, the Sheriff will be referred to as "Sheriff Barry" because these actions occurred during his term as Sheriff and the selective prosecution claim is focused on his administration.

the number of OHLEG misuses does not make a difference when deciding if someone should be criminally charged. CP testified there is no legitimate reason to run a deputy more than once per year as part of an annual review, yet, he was unable to explain why he personally ran searches on several deputies in 2015 and 2016 more than once per year⁸. He then testified, “it would have been some [law enforcement] reason,” but, he could not articulate a law enforcement reason, only that one must have existed.

Despite the self-serving “law enforcement purposes” the SCSO offers for AB, CP, and WW’s use as reasons not to have referred those cases for prosecution, and despite the OAG’s declaration the SCSO did not understand running oneself through OHLEG violated OAG rules and regulations before 2018, the SCSO neither advised nor advocated to the OAG or the Summit County Prosecutor’s Office that the Defendant’s allegedly wrongful OHLEG self-searches occurred during the time it was “clear” the SCSO “did not understand that running oneself through OHLEG was a violation of their rules and regulations,” and that Defendant should not be prosecuted. The problem was so prevalent that every deputy was de-certified from OHLEG use privileges and had to be retrained and recertified. CP’s self-serving claim that his multiple searches of other deputies “would have been” for some elusive, unidentified law enforcement purpose remains uninvestigated for prosecution, and is thought provoking when compared with Detective Kline’s inability to identify a reason for Defendant’s self-searches, which formed the basis for Defendant’s prosecution.

The evidence revealed in 2016, the Akron NAACP pressured Sheriff Barry to have more African Americans “on the fourth floor” because the fourth floor command group was “lily white.” The NAACP complained of the disproportionate lack of African Americans in SCSO leadership, compared to the community’s composition of African Americans. Selection

⁸ These searches were never investigated in any manner by the SCSO or other law enforcement agency.

into the Internal Affairs Division was solely within Sheriff Barry's discretion. Therefore, Sheriff Barry took the opportunity to promote Defendant to Internal Affairs, a department consisting of two people. Testimony was presented that Defendant was selected for this "career enhancing" position due to Sheriff Barry's admiration of Defendant, Defendant's competence, and "also because he was Black." Race was admittedly a factor in Defendant's promotion in January 2017.

There was testimony that Sheriff Barry stayed out of the investigation of Defendant to avoid accusations of bias and favoritism and to avoid appearing as though Sheriff Barry was "trying to manipulate the process to protect Antonio from what he was facing." However, the evidence reveals Sheriff Barry displayed no such concerns or efforts to avoid accusations or perceptions of bias, favoritism, or manipulation to protect white SCSO deputies from what they were facing; such as the consequences of GP's searches of his romantic interests; overturning the administrative board's recommendation that WW be fired, and Sheriff Barry's dismissal of his counsel's legal opinion that WW's conduct was criminal and should be referred for prosecution; allowing supervisors to order others, such as CP, to conduct self-searches as part of their annual reviews during the time when the SCSO clearly did not understand self-searches violated OAG rules and regulations; accepting CP's self-serving statement that his multiple searches of other deputies was for an elusive unidentified law enforcement purpose; and, determining AB's off duty request for license plates of a vehicle he believed was following him was for a "law enforcement purpose." In these instances, Sheriff Barry determined or approved the suggested "law enforcement purpose," rather than investigate whether the use was "without the consent of, or beyond the scope of the express or implied consent of, the superintendent of the bureau of criminal identification and investigation" and therefore, in violation of R.C.

2913.04(D). Sheriff Barry's determinations, which start within the SCSO, are final, because, "He's the Sheriff."

The burden to maintain a selective prosecution claim is on the Defendant, as the prosecutor enjoys a presumption that prosecutor's actions are non-discriminatory in nature. *State v. Keene*, 81 Ohio St.3d 646, 693 N.E.2d 246 (1998). Whether to prosecute a criminal offense is generally left to the discretion of the prosecutor. *United States v. Armstrong*, 517 U.S. at 464, 116 S.Ct. 1480, 134 L.Ed.2d 687. That discretion is subject to constitutional equal protection principles, which prohibit prosecutors from selectively prosecuting individuals based on "an unjustifiable standard such as race, religion, or other arbitrary classification." *Id.*, quoting *Oyler v. Boles* (1962), 368 U.S. 448, 456, 82 S.Ct. 501, 7 L.Ed.2d 446⁹. Although a selective-prosecution claim is not a defense on the merits to the criminal charge itself, a defendant may raise it as an "independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution." *State v. Getsy* (1998), 84 Ohio St.3d 180, 203, 702 N.E.2d 866; see, also, *Armstrong*, 517 U.S. at 463, 116 S.Ct. 1480, 134 L.Ed.2d 687.

To support a claim of selective prosecution, "a defendant bears the heavy burden of establishing, at least *prima facie*, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights." *State v. Flynt* (1980), 63 Ohio St.2d 132, 134, 17 O.O.3d 81, 407 N.E.2d 15, quoting *United States v. Berrios* (C.A.2, 1974), 501 F.2d 1207, 1211. The conscious

⁹ Because alleged OHLEG violations typically are discovered within the SCSO, the Court will analyze whether SCSO is selecting individuals for criminal investigation and referral based on race, rather than the prosecutor. See, *State v. Norris*, 2002-Ohio-1033.

exercise of some selectivity in enforcement is not, in itself, a violation of the Equal Protection Clause. *Flynt, supra; Zageris v. Whitehall* (1991), 72 Ohio App.3d 178, 186, 594 N.E.2d 129.

Because OHLEG violations are typically discovered within the law enforcement agency responsible for enforcing the law and referring matters for criminal investigation and prosecution, the SCSO's actions are properly scrutinized. The Summit County Prosecutor would only be aware of OHLEG infractions originating within the SCSO where Sheriff Barry exercised discretion in referring matters discovered internally.

Defendant claims his OHLEG uses were similar or less offensive than the uses of white SCSO employees; yet, he was treated much more harshly since he was the only one criminally prosecuted. Defendant asserts the only difference between him and the other SCSO employees is they are white and he is African American. The Court would be surprised if there were ever an instance where a claim of racial discrimination was openly admitted. Attorney Cody testified he agreed with the statement that he would not expect Sheriff Barry to come right out and say he did not like African Americans.

On review, the Court finds the presumption of non-discrimination is overcome by Sheriff Barry's willingness to intervene and prevent prosecution when white SCSO deputies were alleged to have committed OHLEG violations, but not when an African American was similarly alleged to have violated OHLEG terms of use. Furthermore, Defendant's self-searches occurred during the time the OAG became cognizant of the SCSO's "bad practices" and it was "clear" the SCSO "did not understand running oneself through OHLEG was a violation of their [OAG's] rules and regulations," and every SCSO deputy was decertified and retrained, rather than prosecuted, except Defendant. Self-searches once per year for an annual review was "not an uncommon violation" per the OAG, yet, the OAG and the SCSO, in exercising their discretion, did not prosecute these common violations. In their discretion, these

violations were excused as “training issues.” CP testified there was no reason to run a deputy more than once per year for an annual review, yet, his inability to articulate his elusive “law enforcement purpose” for running other deputies several times within one year was accepted as not violating OHLEG rules.

Although SCSO detectives diligently investigated certain suspicious OHLEG uses, Sheriff Barry’s exercise of discretion and influence in the outcome of those investigations is inconsistent. Sheriff Barry made no effort to protect Defendant from any consequences, as he did with the white SCSO deputies. The State claims the reason for not prosecuting the white SCSO deputies’ conduct was the SCSO’s determination of a “legitimate law enforcement purpose” for those deputies’ use, despite the improper manner of the use. However, Sheriff Barry never permitted GP, CP, WW, and AB’s questionable uses of OHLEG to be referred to the Summit County Prosecutor for an independent determination of prosecution, only Defendant’s. Defendant’s self-searches were also not excused as a “training issue” the way the white SCSO deputies’ self-searches were classified. The evidence reveals GP, CP, WW, and AB would most likely have faced criminal investigation and/or prosecution, but their cases remained within the SCSO. The Court finds Sheriff Barry’s attempt to avoid accusations of favoring and protecting Defendant and being accused of “trying to manipulate the process to protect Antonio” not credible, as Sheriff Barry did not share the same fear of appearing to manipulate the process or protect white officers alleged to have misused OHLEG. Sheriff Barry’s influence over the SCSO is clearly evident where he overruled his own legal advisor’s opinion that WW’s OHLEG use was criminal. Despite the ongoing difference of opinion, Attorney Cody declined to refer WW’s matter for criminal prosecution for fear of insubordination to Sheriff Barry. When Sheriff Barry determined a “law enforcement purpose”

existed for certain OHLEG searches, or that a use was not criminal, the inquiry ended at the SCSO.

The conscious exercise of some selectivity in enforcement is not, in itself, a violation of the Equal Protection Clause. *Flynt, supra; Zageris v. Whitehall* (1991), 72 Ohio App.3d 178, 186, 594 N.E.2d 129. The decision whether to prosecute a criminal offense is generally left to the discretion of the prosecutor. *United States v. Armstrong*, 517 U.S. at 464, 116 S.Ct. 1480, 134 L.Ed.2d 687. The evidence reveals SCSO employees' OHLEG misuses are first discovered and investigated internally; therefore, selection of SCSO employees for prosecution of OHLEG violations starts with the SCSO. The Court is well aware that not every infraction of every law is prosecuted; it is within the sound exercise of discretion of police officers to not arrest or summons people for every possible offense, and the prosecutor to decline to prosecute all potential violations of laws. However, the evidence in this case reveals the SCSO did not even entertain an exercise of discretion whether to prosecute Defendant; yet discretion was exercised favorably for the white SCSO deputies.

The Court has had the opportunity to review the record and observe the demeanor and credibility of the witnesses who testified in this case. Although Defendant's use of OHLEG may form the basis for a criminal charge, prosecution is prohibited when an unjustifiable standard, such as race, is used to determine who becomes a criminal defendant. The evidence reveals race was a factor in Sheriff Barry's decision to promote Defendant to his position as an IAD officer due to NAACP pressure to have the fourth floor command personnel be representative of the community and not "lily white." Defendant, and likely other white SCSO deputies, were qualified for the position as an IAD officer, but Sheriff Barry promoted Defendant, who he may not have otherwise promoted, to alleviate pressure from the NAACP. SCSO employees who testified regarding the influence of race in the SCSO appeared defensive

and protective of Sheriff Barry, their employer. Defendant's "bad practice" of conducting self-searches on OHLEG led to his prosecution, as opposed to construing his self-searches as a "training issue," requiring decertification and retraining in OHLEG, which was the fate of the entire SCSO in 2018 for engaging in the same "bad practice." Although the evidence at the hearing only revealed two specific SCSO employees who engaged in the "bad practice" of running self-searches (CP and Defendant,) the Court finds it unlikely the OAG would have decertified every deputy in 2018 if the prevalence of self-searches was limited to these two individuals, or a once per year self-search for purposes of an annual review. The Court finds no other plausible reason, except race, for Sheriff Barry's failure to exercise his discretion not to refer Defendant for prosecution. Sheriff Barry's fear of being accused of "favoritism" towards Defendant, given Sheriff Barry's high respect and esteem for Defendant, is a fear he willingly set aside when white SCSO deputies, who presumably also had Sheriff Barry's respect and esteem, and were alleged to have violated OHLEG usage terms. Sheriff Barry uniquely selected Defendant to avoid an appearance of "favoritism" and "manipulation" of the process, to protect "from what he was facing." The dreaded appearance of "favoritism" and "manipulation" of the process to protect white Summit County Sheriff's Deputies did not deter Sheriff Barry from doing so. The difference in Defendant's treatment, compared to the other four white SCSO deputies, amidst the "training issues" that existed in the SCSO at the time, based on the same alleged conduct of violating the terms of OHLEG, was unexplained. CP's elusive unidentifiable law enforcement purpose for running an OHLEG search on deputies multiple times in one year was accepted without hesitation, yet, Defendant's self-searches were not afforded the same benefit of the doubt. The Summit County Sheriff's deliberate choice not to exercise any discretion in Defendant's selection for prosecution for the same violations committed by white

SCSO deputies, who were not referred for prosecution, is invidious¹⁰ conduct based on Defendant's race.

WHEREFORE, for the reasons set forth above, Defendant's motion to dismiss counts 6-15 of the indictment for selective prosecution is GRANTED.

IT IS SO ORDERED.



JUDGE MARY MARGARET ROWLANDS

CC: ASSISTANT SUMMIT COUNTY PROSECUTORS FELICIA EASTER/JENNIE SHUKI
ATTORNEY BRAD WOLFE
ATTORNEY IAN N. FRIEDMAN
ATTORNEY MARK DEVAN

¹⁰ <https://www.dictionary.com/browse/invidious>, 2. "offensive or unfairly discriminating; injurious."